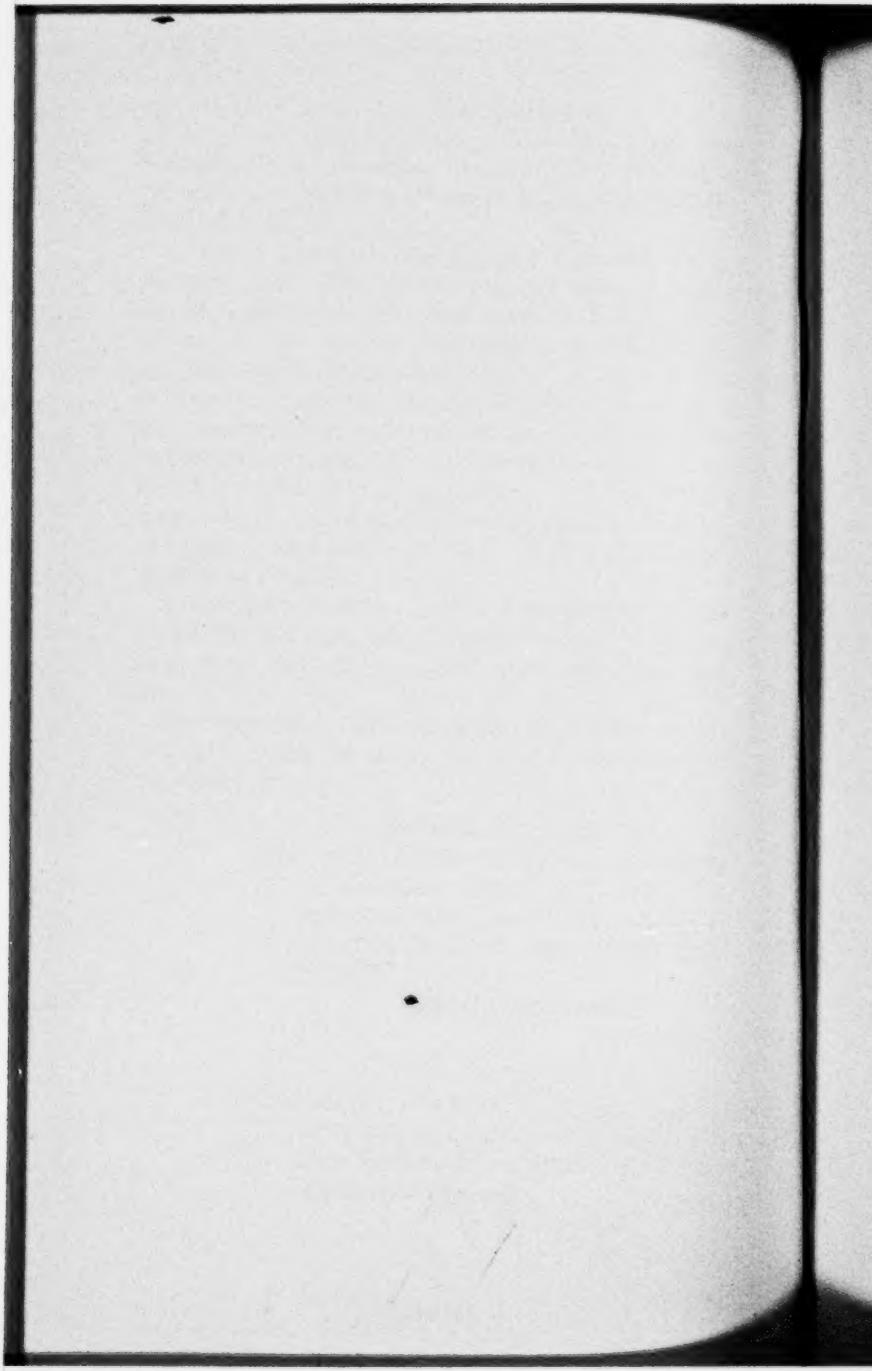

Office Supreme Court U.
FILED
MAR 14 1904
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,
AGAINST
THOMAS G. RITCH *et al.*, individually and as Executors, &c., *et al.*,
Defendants.
No. 157

JOHN B. REYNOLDS, as sole Executor of the Last Will and Codicils of Lucy Fayerweather, deceased,
Appellant,
AGAINST
THOMAS G. RITCH *et al.*, individually and as Executors, &c., *et al.*,
Defendants.
No. 158.

BRIEF FOR DEFENDANTS THOMAS G. RITCH, JUSTUS L. BULKLEY AND HENRY B. VAUGHAN, INDIVIDUALLY AND AS EXECUTORS, &c., OF THE WILL AND CODICILS OF DANIEL B. FAYERWEATHER, DECEASED, AND OTHER DEFENDANTS HEREIN.

The complainants Emma S. Fayerweather and Mary W. Achter in the bill and John B. Reynolds, as sole executor of the last will and codicil of Lucy Fayerweather, deceased, complainant in the cross-

bill, move this Court for an order dispensing with printing and serving Volumes 5, 6 and 7 of the record and return herein. Each of these volumes is an inseparable part of the return filed by the Clerk of the United States Circuit Court for the Southern District of New York in this Court (see certificate of John A. Shields, page 1, of Vol. 1, of the record). That certificate is in part as follows:

> "I, John A. Shields, Clerk of the Circuit Court of the United States for the Southern District of New York, do hereby certify that the following Volumes 1, 2, 3, 4, *5, 6, 7*, the pages of which are numbered in Vol. 1 from 1 to 645, in Vol. 2 from 1 to 1217, in Vol. 3 from 1 to 605, in Vol. 4 from 1 to 877, *in Vol. 5 (case on appeal of Amherst College* vs. *Ritch) from 1 to 1117, in Vol. 6 (in the matter of the probate, &c., of Daniel B. Fayerweather) from 1 to 916, in Vol. 7 (appendix of exhibits) from 1 to 600 inclusive, contain a true and complete copy and transcript of the record,* assignment of error *and all proceedings had in said Court in the cause entitled, &c.*"

Said Volume 5 was introduced in evidence by defendants (see Vol. 3, p. 3, fol. 4; also Vol. 3, pp. 580 and 581).

Volume 6 was the record of the proceedings in the Surrogate Court in the City of New York upon the probate of the will and codicils of Mr. Fayerweather, and was introduced in evidence by complainants.

Volume 7 contains various exhibits introduced in evidence by the defendants, being brief of the complainants Fayerweather and Achter and John B. Reynolds, as executor, in the General Term of the Supreme Court, in the State of New York, in the case of the Trustees of Amherst College *vs.* Ritch (see pp. 1 to 196, inclusive, of said Vol. 7); also the briefs used by the same parties in the Court of Appeals in the State of New York in the same

cause (see pp. 197 to 411, inclusive, of said Vol. 7); the remittitur of the Court of Appeals upon the determination of said appeal (see pp. 412 and 413 of said Vol. 7); motion papers in Court of Appeals upon application of John B. Reynolds, as sole executor of the last will and codicils of Lucy Fayerweather, deceased, and Mary W. Achter and Emma S. Fayerweather to amend the remittitur in said Court (see pp. 414 to 442, inclusive, of said Vol. 7); also brief used in said Court by said Reynolds, Fayerweather and Achter on said motion to amend remittitur (see pp. 443 to 459, inclusive, of said Vol. 7); the order of the Court of Appeals denying said motion (see p. 430, Vol. 7); the order of the Supreme Court, making the judgment of the Court of Appeals the judgment of the Supreme Court (see p. 461 of said Vol. 7); the report of the Referee under the judgment of the Supreme Court in Amherst College *vs.* Ritch (see pp. 464 to 480, inclusive, of said Vol. 7); the exceptions of defendants Reynolds, as Executor of Mrs. Fayerweather, Mary W. Achter and Emma S. Fayerweather to Referee's report (see pp. 481 to 485, inclusive, of said Vol. 7); proposed final judgment and final judgment in said case of Amherst College *vs.* Ritch (see pp. 486 to 524, inclusive, of said Vol. 7); also complaint in Reynolds as Executor, &c., *vs.* Ritch (see p. 525 to 600, inclusive, of Vol. 7).

All of these exhibits were introduced in evidence by the defendants.

This application is made upon the record and upon the affidavit of William Blaikie, the solicitor for John B. Reynolds. This affidavit is misleading in certain particulars. It states that it is an affidavit upon a motion to approve, effectuate and carry out *orders upon consent* made in the United States Circuit Court herein for the printing of the record, and on page 5 of the affidavit it is stated:

> "That upon July 18, 1901, Judge Lacombe ordered, *upon the stipulation of all the solicitors* (see Vol. 4, pp. 639 to 641, inclusive), that

> the printed case on appeal in the so-called five college case, meaning thereby said case of the Trustee of Amherst College, &c., *vs.* Ritch *et al.*, need not be printed at length either for final hearing or for return either to the Circuit Court of Appeals or to the Supreme Court of the United States; but that one copy may be used upon final hearing and served, attested or identified in lieu thereof."

An examination of the order referred to in Vol. 4, pages 634 to 641, shows that this statement is incorrect upon its face, for the order expressly shows that it was not upon consent, but was against the protest and opposition of counsel for the defendants.

The order recites that it was opposed by C. N. Bovee, Jr,, and Mr. Stimson, as counsel for the defendants. But whatever order may have been made by the Court below such order could not be effective in this Court. The rules of this Court require the record to be printed.

It is also stated in the affidavit of Mr. Blaikie as follows:

> "Upon November 30, 1900, John E. Parsons, as counsel for the defendants Bulkley, Vaughn and others, herein stipulated upon the record with counsel for complainants and cross-complainants (Vol. 3, pages 4 and 5) that said record upon appeal to the New York Court of Appeals—a stipulated copy of which was filed with the Clerk of said Circuit Court—may be used upon the final hearing and upon any appeal herein without incorporating them in the record physically."

The affidavit of Mr. Parsons submitted herewith shows very clearly that the words "by this Court" meant the Circuit Court and the Circuit Court of Appeals and not the Supreme Court of the United States, and that the word "herein" used in the stipulation meant in the cause in the United States Circuit Court, and did not contemplate an appeal to the Supreme Court of the United States.

It is manifest that if this Court does not dismiss

the appeals herein that Vol. 5 will be indispensable both to Court and counsel in the consideration and determination of the appeals.

Daniel B. Fayerweather died November 15, 1890, leaving a will and four codicils, and appointing Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan executors and trustees. By the last codicil said Bulkley, Ritch and Vaughan were made residuary legatees. After a contest in the Surrogate's Court in New York County upon objections filed by Lucy Fayerweather, the widow of testator, and Emma S. Fayerweather, Mary W. Achter and Lucy B. Beardsley, nieces of the testator, and his heirs at law and next of kin, the will and codicils were admitted to probate in February and March, 1891, and said Ritch, Bulkley and Vaughan qualified as executors and entered upon the performance of their duties.

By the ninth clause of his will Mr. Fayerweather gave twenty-one hundred thousand dollars to twenty colleges and institutions named in said ninth clause of his will. Said Ritch, Bulkley and Vaughan having made a deed of transfer of the residuary estate to a large number of colleges, hospitals and charitable organizations, an action was brought by the trustees of Amherst College and four of the colleges named in the ninth clause of the will, against said Ritch, Bulkley and Vaughan and others, to recover the entire residuary estate in favor of the plaintiffs, and the other colleges named in the ninth clause of the will. All the colleges named in the ninth clause of the will were parties to that suit, either as plaintiffs or defendants. Mrs. Fayerweather, the widow, having died, John B. Reynolds, her executor, and the three nieces, Emma S. Fayerweather, Mary W. Achter and Lucy B. Beardsley, were made defendants, and all the colleges, hospitals and charitable institutions named in the deed of transfer from Ritch, Bulkley and Vaughan were also made parties defendant. Every person who by any possibility could have a claim to

the residuary estate of the testator was before the Court. The Court had jurisdiction of the parties in the subject matter.

Reynolds as Mrs. Fayerweather's executor, and Emma S. Fayerweather and Mary W. Achter, the plaintiffs in the bill and the cross-bill herein, appeared and were represented by William Blaikie and Edward C. James, who filed answers in their behalf in which they claimed the residuary estate. The cause was tried before Justice Truax in a Special Term of the Supreme Court, New York. Judgment was rendered in favor of the twenty colleges named in the ninth clause of the will. It was held that they were entitled to the residuary estate. From this judgment Reynolds, as executor of Mrs. Fayerweather, and Emma S. Fayerweather and Mary W. Achter appealed to the General Term, where the judgment was affirmed. They then appealed to the Court of Appeals, where the judgment was affirmed. They then made a motion to the Court of Appeals to amend the remittitur; the motion was denied. Thereafter final judgment was entered in said action directing distribution of the residuary estate, as provided for in said decree among the twenty colleges.

Prior to the entry of this final judgment the complainants in the bill herein, Fayerweather & Achter, began the above suit, and thereafter Reynolds filed the cross-bill herein. To the bill and cross-bill the defendants Ritch, Bulkley and Vaughan and the twenty colleges named in the ninth clause of the will filed pleas wherein they set up the judgment in Amherst College *vs.* Ritch as a bar to the maintenance of this action, and upon the issue raised by these special pleas the record in Amherst *vs.* Ritch was introduced in evidence by the defendants to support said pleas. Upon the final hearing before Judge Lacombe, in the Circuit Court, the bill of complaint and the cross-bill

were dismissed, and the pleas of the defendants sustained. It is manifest that if this Court should hold that it has jurisdiction of this appeal and if a motion of the defendants to dismiss the appeal should be denied, the said record of Amherst *vs.* Ritch will be essential to the Court and counsel upon the argument and determination of the appeal herein, and in case this motion should be granted herein, the nine judges of this Court instead of having a copy of this record for each Judge will have but the single copy on file with the Clerk of the Court. This would result in embarrassment and delay. Not only might the Court be embarrassed, but some of the counsel for the defendants, if they did not have a copy of this record in Amherst *vs.* Ritch, would also be embarrassed in the preparation of briefs. No sufficient ground has been shown in the motion papers to justify granting the motion.

In the case of School District *vs.* Insurance Company, 101 U. S., 472, the Court said:

> "We must insist on a strict observance by counsel of all the rules intended to facilitate our examination of causes, especially those submitted. Although in general statutes are to be found in the Congressional Library, we do not have them at our rooms where necessarily cases are investigated. A little trouble on the part of counsel in obeying this particular rule will expedite materially our labors. We take this opportunity of calling attention to this subject."

This decision of the Court applies with particular force to this proposed motion. Reference has been made to the fact that the appellants in this case for nearly twelve years have had a grievous burden of expense of litigation to bear. We can only say that if in the face of final decisions of the Courts, parties will continue litigation, they must expect to bear the burden of expense.

The motion to dispense with the printing of Volumes 5, 6 and 7 should be denied.

JOHN E. PARSONS,
Of Counsel for Bulkley and Vaughan, individually and as Executors, &c., of Daniel B. Fayerweather, decd.,
52 William Street,
N. Y. City.

C. N. BOVEE, Jr.,
Of Counsel for Thomas G. Ritch, individually and as Executor, &c., of Daniel B. Fayerweather, deceased,
18 Wall Street,
N. Y. City.